No. 83-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFFORD B. ERNST, JR. - - - Petitioner

versus

INDIANA BELL TELEPHONE, CO., INC.
and COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 5703 - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Should the holding of the United States Supreme Court in *Delcostello* v. *International Brotherhood of Teamsters* be given retroactive application to defeat Petitioner's Cause of Action?

2. Is there an implied private right of action under section 503(a) of the Rehabilitation Act, 29 U.S.C. §793 (a)?

3. Were there genuine issues of fact presented by the Petitioner to preclude the grant of Summary Judgment?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CLIFFORD B. ERNST, JR. - - - *Petitioner*

v.

INDIANA BELL TELEPHONE, CO., INC. and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703 - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Clifford B. Ernst, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 28, 1983.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit was rendered on July 28, 1983, and is to be published.

The Judgment of the United States District Court for the Southern District of Indiana, New Albany Division, was entered on December 30, 1982.

JURISDICTION

The as yet to be published Opinion of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the United States District Court for the Southern District of Indiana, New Albany Division, granting a Summary Judgment in favor of the Respondents was rendered and entered on July 28, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management and Relations Act, 29 U.S.C. §185(a)(1947).

Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a)(b) (1978).

Indiana Code §34-1-2-2(1981)

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b)(1947).

STATEMENT OF THE CASE

The Petitioner, Clifford B. Ernst, Jr., from June 28, 1965 until April 27, 1980, was employed as an installation repair technician by Respondent, Indiana Bell Telephone Company, Inc. (hereinafter referred to as Indiana Bell). Petitioner was terminated from his employment on April 27, 1980 after having exhausted his sickness disability benefits which he was receiving due to a serious injury suffered by him during a motor vehicle accident on April 21, 1979. The accident occurred at approximately 12:30 A.M. while

Petitioner, driving an Indiana Bell truck, was returning to the Indiana Bell compound from a job he had been ordered to perform by the Respondent, Indiana Bell. Petitioner had received two work orders during the day from Respondent, Indiana Bell, involving conversion of an existing telephone system to touchtone equipment, and installation of an additional telephone line at one location and a new connect at a second location. The Petitioner, believeing he had express as well as implied authority from the Respondent, Indiana Bell, worked past his normal quitting time of 5:00 P.M. in order to finish the two job orders.

The Petitioner applied for disability benefits as a result of his injuries sustained in the accident and for overtime wages covering the time period beyond his normal quitting time of 5:00 P.M. The Respondent, Indiana Bell, classified the injuries as having occurred off-the-job rather than on-the-job and placed the Petitioner on its "sickness medical disability" benefits program instead of its "Accident Benefits" program. The distinction between the two programs being that under the former Petitioner was only allowed to be compensated for a maximum of a year and was terminated from his employment automatically upon his inability to resume his former duties because of his disability.[1] Whereas, under the latter program when it is determined that an employee's injuries are "work-related" the employee is eligible to receive disability

[1]Petitioner was permanently restricted by his physician from climbing telephone poles, a part of his regular employment duties.

benefits until retirement or until he is able to return to work at his regular employment. The Respondent, Indiana Bell, also denied Petitioner's request for overtime wages, terming his extra hours of April 20, 1979, as "unauthorized overtime" and thus not compensable.

The Petitioner, a member of the Respondent, Communications Workers of America, Local 5703 (hereafter Union) filed through that Union two grievances protesting his placement on the sickness Medical Disability Plan and the denial of overtime compensation. (Appendix D, pp. 33, 34.) These grievances were filed August 22, 1979. The Union pursued these grievances through the normal grievance procedure pursuant to Article 7 of the Collective Bargaining Agreement between Indiana Bell Telephone Co., Inc. and Communications Workers of America. Unsuccessful in overturning the Respondent, Indiana Bell's determinations the Respondent, Union requested arbitration of the denial of overtime compensation. The Union did not recommend the issue of improper disability payments for arbitration deciding that it was specifically excluded from arbitration by the Collective Bargaining Agreement.

While still on the employment rolls of Respondent, Indiana Bell, and collecting disability benefits, Petitioner requested that the Respondent, Indiana Bell, assign him to "lighter duty" employment due to his permanent inability to perform the necessary duties of his former job. The Respondent, Indiana Bell, refused to comply with this request even though Petitioner contended that this avenue had been pursued

successfully in the past by other injured employees of Respondent, Indiana Bell. The Union gave no assistance to the Petitioner in his attempts to procure "lighter duty" employment.

After having collected the maximum allowable benefits under the "Sickness Disability" plan the Petitioner was discharged by the Respondent, Indiana Bell, on April 27, 1980. The Union did not grieve Petitioner's discharge opting instead to pursue the overtime compensation grievance. The Union reasoned a resolution of that grievance in Petitioner's favor would lead to a re-classification of Petitioner's accident and injuries to on-the-job and this reinstatement of employment and entitlement to placement on the Accident Disability plan.

The Petitioner was granted an arbitration hearing which was held on January 13, 1981 approximately nine months after his termination. The impartial arbitrator presiding over that hearing found the issue before him to be:

> Whether the employer's action in disallowing payment constitutes a violation of the pertinent contract sections because grievant Ernst was either impliedly authorized by past practice and past supervisors or was actually authorized on the evening in question, April 20, 1979, or whether Ernst's actions that evening were unauthorized so that no overtime work was performed or compensable under the terms of this agreement.

On May 31, 1981, the impartial arbitrator found that the time that the Petitioner was working after

5:30 P.M. on April 20, 1979, was unauthorized overtime and not compensable and denied the grievance in its entirety. No appeal of this award was taken by either the Petitioner or the Respondent, Union.

On April 9, 1982, the Petitioner filed in the United States District Court for the Southern District of Indiana, New Albany Division (hereinafter District Court) a cause of action against the Respondents alleging wrongful discharge by the Respondent, Indiana Bell; breach of its statutory duty of fair representation by the Respondent, Union, and discrimination against the Petitioner on the basis of his disability against both Respondents. Petitioner invoked the jurisdiction of the District Court based upon alleged violations of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) (1947) and of Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a) (1978).

On November 5, 1982, after having discovery by means of Interrogatories and Deposition of Petitioner, Respondent, Indiana Bell filed a consolidated Motion to Dismiss for Failure to State a Claim and for Summary Judgment. On November 18, 1982, the Respondent, Union, also filed a Motion for Summary Judgment. Thereafter on December 29, 1982, the District Court issued its Findings of Fact, Conclusions of Law and Judgment granting Summary Judgment to both Respondents and entered them into the record on December 30, 1982. (Appendix C, p. 22.)

In its Judgment the District Court found specifically that there were (a) no genuine issues of fact as

to Petitioner's allegations that he was wrongfully discharged by the Respondent, Indiana Bell, nor that he was unfairly represented by the Respondent, Union; (2) that, in any event that Petitioner's claim was barred by the statute of limitations, applying Indiana's 90-day limitation on actions to vacate arbitration awards, Indiana Code 34-4-2-13; and (3) that Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793 does not expressly provide for a private right of action, nor could one be implied. (Appendix C, p. 22.)

Accordingly, Petitioner appealed the District Court's Judgment against him to the United States Court of Appeals. After submission of briefs by all parties and the hearing of oral arguments the Seventh Circuit rendered its decision by published opinion on July 28, 1983. (Yet to be published) (Appendix A, p. 17). The Seventh Circuit affirmed the District Court's judgment dismissing Petitioner's Complaint by holding that (a) there were no genuine issues of fact thus the District Court's grant of Summary Judgment was proper, (2) that the Seventh Circuit's prior holding in *Simpson* v. *Reynolds Metals Co.*, 629 F. 2d 1226, that there is no private right of action under Section 503(a) of the Rehabilitation Act, 29 U.S.C. §793(a) (1978), thus dismissal of that portion of Petitioner's Complaint was proper, and (3) that the United States Supreme Court's decision rendered in *DelCostello* v. *International Brotherhood of Teamsters,* 51 U.S.L.W. 4693 (1983) was controlling and thus dismissal was proper. The Supreme Court in *DelCostello* held that six-month statute of limitations provided in

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1947) applied to similar circumstances as were presented in Petitioner's case.

It is from this decision that the Petitioner petitions this Court for a Writ of Certiorari. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

REASONS FOR GRANTING THE WRIT

I. The Holding of the United States Supreme Court in *Delcostello* v. *International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (1983), Should Not Be Applied Retroactively to Defeat Petitioner's Claim.

In its recent decision of *DelCostello* v. *International Brotherhood of Teamsters*, No. 81-2386, 51 U.S.L.W. 4693 (1983), this Honorable Court held Section 10(b) of the National Labor Relations Act establishing a six-month limitations period was applicable to an employee suit against an employer and a union for breach of a collective-bargaining agreement and breach of a union's duty of fair representation. The Court of Appeals for the Seventh Circuit relied upon this June, 1983, to support i' affirmance of the District Court's dismissal of Petitioner's Complaint. Although Petitioner concedes that his cause of action is similar to that in *DelCostello*, he contends that the principle announced therein should not be applied to defeat his action instituted in April of 1982 based upon events which occurred in April of 1980. In *DelCostello*, 524 F. Supp. 721 (1981), the United States District Court for the District of Maryland enumerated the factors which are to be considered in deciding whether to apply a decision nonretroactively.

> . . . First, the decision sought to be applied only prospectively must establish a new legal principle, either by overruling "clear past precedent" or by deciding a case of first impression, resolution of which "was not clearly foreshadowed" in earlier cases. *Id.* 404 U. S. at 106, 92 S. Ct. at 355. The prior history, purpose and effect of the rule are to be weighed, to determine whether retroactive application furthers or retards its operation. *Id.* at 106-07, 92 S. Ct. at 355. Finally, retroactive operation must be weighed to see whether substantial injustice or hardship is caused. *Id.* at 107, 92 S. Ct. at 355.

At the time that the Petitioner instituted his cause of action, the controlling decision regarding the statute of limitations was *Autoworkers* v. *Hoosier Corp.,* 383 U. S. 696 (1966), which held that Indiana's state six-year statute of limitations statute for suits upon contracts should be applied to a suit against an employer for violation of a collective bargaining agreement. In reliance upon this past precedent, the Petitioner commenced this action. In light of this, this Court's action in applying a six-month limitation period in *DelCostello* was a clear departure from its holding in *Autoworkers* v. *Hoosier,* and its application to Petitioner's cause of action would work a severe hardship upon and cause a substantial injustice upon the Petitioner. Due to the complete failure of action on his behalf by the Union and the unforeseen opinions of future courts, the Petitioner has been left without a remedy under the law. Petitioner submits that this Court should hold *DelCostello* only prospectively applicable and that he

should be permitted to continue with his valid and meritorious claim against the Respondents.

II. Petitioner Has an Implied Right to Bring a Private Right of Action Under 29 U.S.C. §793(a), The Rehabilitation Act.

Petitioner commenced his action against the Respondent, Indiana Bell, claiming that its action in terminating his employment without any consideration toward placing him in a more suitable job in light of his physical handicap was a violation of the Rehabilitation Act, 29 U.S.C. §793(a), Section 503(a). The Respondent, Indiana Bell, admittedly falls within the provisions of that Act. The Petitioner admittedly is one of the class for whose benefit the statute was enacted. The question for this Court then becomes whether there is any indication that the legislature through implication intended to create a private remedy which would be consistent with the underlying purposes of the legislative scheme. *Cort* v. *Ash,* 422 U. S. 66 (1975) and *Chevron Oil Co.* v. *Huron,* 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 296 (1971). This question was answered in the negative by the Seventh Circuit Court of Appeals in *Simpson* v. *Reynolds Metals Co.,* 629 F. 2d 1226 (7th Cir. 1980), relied upon by both Courts below in dismissing Petitioner's cause of action. The Petitioner contends that this is an incorrect application of the test for an implied remedy announced in *Cort* v. *Ash, supra* at p. 78.

> In determining whether a private remedy is implicit in a statute not expressly providing one,

> several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted, . . . —that is does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

29 U.S.C. §793(a) creates a federal right in favor of Ernst:

> 29 U.S.C. 793(a) *Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations.* Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services . . . for the United States shall take affirmative action *to employ and advance in employment qualified handicapped individuals* as defined in section 7(7) [29 USCS §706(7)]. (Emphasis added)

29 U.S.C. §706(7)(B) refers to any handicap other than alcoholism or drug abuse. The case of *Simpson* v. *Reynolds Metals Company, Inc.*, 629 F. 2d 1226 (7th Cir. 1980), cited by the Court below in support of its summary judgment involved alcoholism and should not be applied to a handicap such as involved in this case. Ernst's disabilities would qualify Ernst with a handicap included in 29 U.S.C. §706(7)(B).

Ernst's physicians have restricted his employment capabilities by recommending that Ernst not perform

any work involving pole climbing, ladder climbing or prolonged sitting or squatting. He has been permanently restricted from climbing telephone poles, part of the regular duties of his former employment. Ernst is handicapped in regard to ever assuming his former employment duties.

The Congress implied in its language that Department of Labor administrative remedies are optional, as is demonstrated by the following language of 29 U.S.C. §793(b).

> . . . . . , such individual may *file* a complaint with the Department of Labor (emphasis added)

Use of the word "may" is an indication that the legislature did not intend for Department of Labor administrative remedies to be exclusive.

A private remedy is consistent with the underlying purpose of federal legislation in regards to handicapped individuals.

> . . . it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action.

Lloyd v. *Regional Transp. Authority,* 548 F. 2d 1277 (7th Cir. 1977).

In *Yakin* v. *University of Illinois, Etc.,* 508 F. Supp. 848 (N.D. Ill. 1981), the Court in a Title VI Civil Rights Act of 1964 action wrote:

> Where it is clear that federal law has granted a class of persons certain rights, it is not necessary

> to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.

29 U.S.C. §793 contains no indication to deny a private cause of action. Additionally, the use of the word "may" (29 U.S.C. §793(b)) evidences legislative intent that a private cause of action can in fact exist under this section.

III. Petitioner Presented Sufficient Facts to Raise a Genuine Issue of Fact; Thus, Summary Judgment Was Improper.

Petitioner was entitled to maintain his actions against the Respondent upon a showing that "the underlying grievance was meritorious and that the Union breached its duty of fair representation." *Miller* v. *Gateway Transp. Co., Inc.*, 616 F. 2d 272 (7th Cir. 1980). Petitioner's claims against the Respondent, Indiana Bell, were for wrongful discharge and for discrimination based upon his handicap. Petitioner's claim against the Respondent, Union, was for unfair representation based upon the Union's failure to process his grievance for wrongful discharge against the Respondent, Indiana Bell. The Respondents and the Courts below have consistently and inexplicably linked Petitioner's action to the denial of overtime payment for the night of April 20, 1979. By narrowly defining and confining the issue, the courts below have erroneously reviewed the wrong facts. Those courts should instead have focused their attention upon the facts presented by the Petitioner which indicated that the

Respondent, Indiana Bell, had refused to assign the Petitioner to "lighter duty" employment even though that had been its prior practice with similarly situated employees; that the Petitioner was granted and now paid Workers' Compensation benefits upon the Industrial Board's finding that his injuries were indeed work-related, a decision which was upheld by the Indiana State Court of Appeals; and that the Respondent, Union, failed to negotiate with the Respondent, Indiana Bell, on behalf of Petitioner and his request for appropriate employment considering his disability; and the Union's failure to formally abritrate Petitioner's claim of wrongful discharge.

The Petitioner contends that this set of facts was sufficient to raise a genuine issue as to whether he was wrongfully discharged and discriminated against by the Respondent, Indiana Bell, and further that based upon these facts a jury could determine that his treatment by the Union was deliberate, capricious, arbitrary or in bad faith and thus a breach of its duty to fairly represent its long-standing member, Petitioner. Instead of pursuing the larger grievance of wrongful discharge in April of 1980, the Respondent, Union, chose to process a claim for seven hours of overtime payment. This most certainly could be labeled arbitrary and capricious. When issues of fact exist regarding the substance of a claim, summary judgment is inappropriate. *Miller, supra,* 616 F. 2d at 277.

CONCLUSION

Based upon the foregoing facts and argument, the Petitioner requests this Court to grant his petition for a Writ of Certiorari to the United States Court of Appeals, Seventh Circuit, reversing the dismissal of his causes of action against both Respondents.

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 83-1192

CLIFFORD B. ERNST, JR., - - *Plaintiff-Appellant,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. 82 C 82—Cale J. Holder, Judge

ARGUED JUNE 9, 1983—DECIDED JULY 28, 1983*

Before CUMMINGS, *Chief Judge,* BAUER, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

PER CURIAM. We affirm the district court's judgment dismissing the plaintiff's complaint, which alleges violations of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1947), and of Section 503(a) of the Rehabilitation Act, 29 U.S.C. § 793(a) (1978).

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*This appeal originally was decided by an unpublished order on July 28, 1983, pursuant to Circuit Rule 35. The Court has decided to issue the decision as an opinion.

I

On April 20, 1979, Plaintiff Ernst worked installing telephone equipment beyond his 5:00 p.m. scheduled quitting time. While returning from the jobsite after midnight, Ernst was involved in a motor vehicle accident and seriously injured his right ankle and foot. Defendant Indiana Bell Telephone Company characterized Ernst's injuries as "off-the-job." As a result, Ernst was not paid for the overtime he worked that night and was placed on a medical disability benefit program under which he was eligible for payments for one year. Because he had not recovered sufficiently by the end of that year to return to work, Ernst was dismissed from employment in April 1980. If Ernst's injuries had been classified as "work-related," then he would have continued as an employee and remained indefinitely eligible for disability benefits.

In August 1979, Defendant Communications Workers of America, Local 5703 (CWA) filed two grievances regarding the Company's post-accident treatment of Ernst. One grievance protested denial of overtime pay, the other protested Ernst's placement on the "off-the-job" benefit program. CWA representatives pursued both grievances through two stages with Company representatives. CWA then recommended that the overtime pay grievance be submitted to arbitration.

After the decision was made to arbitrate, but before the hearing, Ernst was dismissed from employment. The CWA attorney representing Ernst decided against filing a grievance regarding that termination, instead relying on the overtime pay grievance to settle all issues. Ernst did not request a termination grievance.

In January 1981, the arbitrator heard the overtime grievance. On May 13, 1981, the arbitrator ruled in favor

of the Company and dismissed the grievance in its entirety.*

This suit was commenced on April 9, 1982. Ernst alleges that the Company wrongfully discharged him and that CWA breached its duty of fair representation in handling his grievances. Ernst also alleges that his termination violated the Rehabilitation Act.

II

Ernst does not seriously press upon us, and we cannot find, any genuine issue of material fact requiring a trial in this case. Ernst's evidence does not conflict materially with the defendants' evidence. The closest Ernst comes to establishing a triable factual issue is his allegation that "[t]here is conflicting information concerning Ernst's treatment by the Union concerning negotiating with Indiana Bell for an appropriate job after Ernst's disabling injury and [the Union's] refusal to formally arbitrate his termination of employment." (Appellant's br. at 11.) The district court ruled that the record revealed only that the Union acted diligently and properly at every turn. (R. 21(6).) Our examination of the record leads us to the same conclusion. There is no hint anywhere in this case that the Union's behavior approaches a breach of its duty to fairly represent its member. *See Superczynski* v. *P.T.O. Services, Inc.*, 706 F. 2d 200, 202-203 (7th Cir., 1983).

III

Ernst does not have a private right of action under Section 503(a) of the Rehabilitation Act, 29 U.S.C. § 793(a)

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*In January 1981, Ernest applied for workers' compensation. On July 19, 1982, the Industrial Board of Indiana ruled that Ernst's injuries were work-related and awarded compensation.

(1978). *Simpson* v. *Reynolds Metals Co.*, 629 F. 2d 1226, 1237-38 (7th Cir. 1980). Thus, the district court's dismissal of that portion of Ernst's complaint was proper.

IV

Ernst argues that the district court incorrectly applied Indiana's ninety-day statute of limitations, mischaracterizing the suit as a request to overrule the arbitrator. Ind. Code § 34-4-2-13 (1969). Ernst contends that the court instead should have applied the contract limitations period. Ind. Code § 34-1-2-2 (1981). This issue has been settled for us by the United States Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters*, 51 U.S.L.W. 4693, 4696-98 (1983). The *DelCostello* Court held that the six-month statute of limitations provided in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1947), applies in the circumstances presented in this case. Because this action was filed eleven months after the end of arbitration and nearly two years after Ernst's dismissal, it is untimely.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

Unpublished Per Curiam Order

Judgment—Oral Argument

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 83-1192

CLIFFORD B. ERNST, JR., - - *Plaintiff-Appellant,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. 82 C 82—Cale J. Holder, Judge

UNPUBLISHED PER CURIAM ORDER—July 28, 1983.

Before HON. WALTER J. CUMMINGS, *Chief Judge,* HON. WILLIAM J. BAUER, *Circuit Judge,* HON. THOMAS E. FAIRCHILD, *Senior Judge.*

This cause was heard on the record from the United States District Court for the Southern District of Indiana, New Albany Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

EXHIBIT C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. NA 82-82-C

CLIFFORD B. ERNST, JR., - - - - *Plaintiff,*

v.

INDIANA BELL TELEPHONE COMPANY, INC., and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703, - - - - *Defendants.*

FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

This matter comes before the Court on the November 15, 1982 consolidated motion of defendant Indiana Bell Telephone Company, Inc. (Bell) to dismiss and for summary judgment on the issues of the April 9, 1982 complaint and Bell's November 15, 1982 amended answer consisting of four defenses thereto. Also before the Court is the November 19, 1982 motion of defendant Communications Workers of America, Local 5703 (CWA) for summary judgment on the issues of the April 9, 1982 complaint and CWA's May 28, 1982 answer consisting of eight defenses thereto. The motions were both fully briefed as of December 20, 1982. The Court, being duly advised in the premises, does now submit its ruling.

Clifford B. Ernest, Jr., is a resident of Floyds Knobs, Indiana. From approximately June of 1965 until April of 1980 he was employed by Bell as an installation/repair technician, with the principal duties of installing and re-

pairing telephones for residences and small businesses. A usual and regular part of his duties involved climbing telephone poles and ladders. At all times relevant he was employed at Bell's Mount Tabor Garage in New Albany, Indiana and was also employed pursuant to a collective bargaining agreement between Bell and CWA.

Bell is a corporation, existing and conducting business under the laws of the State of Indiana, engaged in the manufacture, sale, installation, and servicing of telephone communication systems in interstate commerce. Bell is also a federal contractor.

CWA is a labor organization representing employees in an industry affecting commerce, and at all times relevant was the recognized collective bargaining representative of the bargaining unit of Bell's Comptrollers, Marketing and Operations employees, including the plaintiff.

On April 20, 1979 the plaintiff had an assignment to change some equipment at a church and to install another telephone number and another telephone line in a trailer park. In allegedly completing these assignments, the plaintiff was occupied well past this normal quitting time of approximately five o'clock in the afternoon. At approximately midnight the plaintiff sustained a fracture and dislocation of the right foot and ankle when he was involved in an automobile accident while driving a company owned vehicle. The plaintiff claims that he was returning from finally finishing the assignments at the church and trailer park.

Because the accident occurred outside of normal working hours, authorization from one of the plaintiff's superiors to work overtime was needed in order for the plaintiff to be reimbursed for such overtime work. The plaintiff received no such authorization. The time that the accident occurred and the absence of authorization to be working at that hour were the basis for Bell's classifi-

cation of the injury as sustained "off-the-job" and were also the basis for Bell's refusal to pay overtime to the plaintiff for that particular evening's labors.

The classification of the injury as "off-the-job" resulted in the plaintiff being placed on Bell's "sickness" disability benefit program instead of Bell's "accident" disability benefit program. Under the "sickness" program the plaintiff was entitled to, and received, full pay for thirteen (13) weeks and then one-half pay for thirty nine (39) weeks. At the end of fifty-two (52) weeks an employee is no longer eligible to receive benefits and may be, and the plaintiff was, terminated. Upon termination, an employee may, and the plaintiff did, apply for long-term disability pay from the private insurance carrier which administers the benefit plan and which has discretion to decide who is eligible for benefits. These benefits were denied to the plaintiff.

The "accident" disability benefit program provides the injured party (whose injury is classified as "on-the-job") with full pay for thirteen (13) weeks and then half-pay until retirement, or such time as the employee resumes his or her original duties.

After the accident that is the subject matter of this action, doctor's orders prevented the plaintiff from climbing poles or ladders, or from prolonged sitting or squatting; normal chores involved in the perfermance of the job as an installation/repair technician. The prohibition against pole climbing was made permanent by the doctor and, as a result, at no time was the plaintiff able to return to his original job. The plaintiff did apply for light duty jobs during the period that he was receiving "sickness" benefits, but was never placed in one.

In August of 1979 the plaintiff filed two grievances through CWA: one protesting Bell's refusal to pay him overtime for the date of the accident and one protesting the classification of the accident as "off-the-job." Both griev-

ances were processed by CWA representatives through two levels of meetings with Bell representatives, and the union's staff representative for the state of Indiana met with representatives of the company in a third level of the graivance procedure. No grievance was filed over the ultimate termination.

The staff representative for the state of Indiana recommended that the overtime grievance be taken to arbitration before an impartial arbitrator. Prior to making a decision as to whether a grievance will be submitted to arbitration, the grievance is reviewed by the union's state office, which makes a preliminary decision as to whether to arbitrate the grievance. If the state office determines that arbitration is appropriate, it makes such a recommendation to the district office.. At the district office, professional researchers or attorneys review the case to determine, again, whether it merits arbitration. If the district office makes an affirmative decision, the case is submitted to the union's legal staff at its Washington, D.C. headquarters for review and recommendation. The final decision as to whether to arbitrate is made by the Executive Vice President of the national union. The plaintiff's overtime grievance was approved by the national union for arbitration and the issue of whether the plaintiff was to receive overtime pay for the night of the accident was arbitrated.

After the decision to arbitrate, but before the actual hearing, the plaintiff's "sickness" benefits expired and his application for long-term benefits was denied. The plaintiff was terminated, and did not file a grievance over this termination. The union attorney representing the plaintiff in the arbitration determined that resolution of the overtime issue would resolve the benefits issue since a determination that the overtime was authorized would render the accident "on-the-job" and enable the plaintiff to receive the

"accident" benefits. It was also believed that the arbitration would resolve the issue of the plaintiff's termination. These tactics were discussed with the plaintiff by the attorney handling the case.

Prior to the hearing, the attorney representing the plaintiff met with him, and with other witnesses, at least twice to prepare for the hearing.

On January 13, 1981 the arbitration hearing was convened before Arbitrator Elliott H. Goldstein, selected through the Federal Mediation and Conciliation Service. At the hearing the union attorney appeared, cross-examined company witnesses, presented the plaintiff's witnesses, and filed a brief after receiving a transcript of the hearing.

Shortly after the hearing, but before the decision was rendered, the plaintiff wrote to the union and expressed his satisfaction with the manner in which the grievance was presented. The plaintiff described his representation as "clearly superior . . . well-researched and prepared . . . ," a "100% PLUS effort" (original emphasis), "fantastic," "outstanding and everyone did their best, and I'm grateful."

On January 15, 1981, the plaintiff applied to the Industrial Board of Indiana for workers' compensation.

On May 13, 1981 the arbitrator rendered his decision, finding that the time the plaintiff was working after normal working hours on the night of the accident was unauthorized and not compensable. The grievance was denied in its entirety.

The plaintiff's first hearing before the Industrial Board of Indiana occurred on November 3, 1981, and after a partial award was made the plaintiff applied for a hearing before the full Board on November 17, 1981. On July 19, 1982 the full Board found that the plaintiff's injury was work related and awarded workers' compensation.

This action was commenced with the filing of the complaint on April 9, 1982. The plaintiff claims that he was

wrongfully discharged by Bell and that CWA breached its duty of fair representation in the handling of his grievances. It is alleged that the sole reason for the termination was so that Bell could avoid paying the plaintiff the more costly "accident" benefits for which the plaintiff was entitled due to injuries suffered in an on-the-job accident on April 20, 1979. The plaintiff avers generally that CWA breached its duty of fair representation even though it knew that there was no just cause for the plaintiff's discharge, that he was treated differently than other similarly situated employees, and that the negotiations carried on by the union in his behalf were no more than a sham to delude the plaintiff that a sincere effort was being made in his behalf. Relief from these alleged acts of misconduct is sought under 29 U.S.C. 185, Section 301 of the Labor-Management Relations Act. The plaintiff's termination also was alleged to be in violation of 29 U.S.C. 793, Section 503 of the Rehabilitation Act of 1973, because the termination was due to the disability of the plaintiff which was the result of the April 20, 1979 accident.

Bell at all times relevant was an employer in an industry affecting commerce as defined by 29 U.S.C. sections 142(1), 142(3), 152(2), and 185. Bell is also subject to the provisions for employment and advancement of qualified handicapped persons contained in 29 U.S.C. 793. CWA is a labor organization as defined in 29 U.S.C. 142(1), 142(3), 152(5), and 185. The plaintiff is a resident of Indiana. Accordingly, this Court has jurisdiction over all of the issues and over all of the parties to this action.

An action lies under Section 301 of the Labor-Management Relations Act if an employee shows both that the underlying grievance was meritorious and that the union breached the duty to fairly represent the employee. While a union may not arbitrarily ignore a meritorious grievance or process it perfunctorily, the employee does not have the

unqualified right to have his complaint arbitrated regardless of the provisions of the applicable collective bargaining agreement. A union is free to make the decision that a particular grievance lacks merit to justify arbitration, without the fear of being charged with a breach of its duty of fair representation. *See Vaca* v. *Sipes*, 386 U. S. 171, 191-93, 87 S. Ct. 903, 917-18 (1967). Although the allegations contained in the pleadings are the barest of conclusions, it appears that the plaintiff attacks the union for 1) not entering into evidence at the hearing a certain document, 2) not engaging in a particular line of cross-examination with a particular witness, and 3) treating the plaintiff differently than other similarly situated employees by not getting him assigned to less strenuous positions that allow for the injuries. Assuming that these claims are true, they do not even lead to an entertainable inference that the union's conduct during the presentation of the plaintiff's case was deliberately hostile, irrational, arbitrary, capricious, or in bad faith; this is the standard for a finding that a union breached its duty of fair representation.

Contrary to the bald assertions of the plaintiff, the record of this case evidences no issues of fact in regard to the union's alleged deliberate mistreatment of the plaintiff. Rather, the record only shows the diligent efforts of the union on behalf of the plaintiff. All of the grievances pertinent to this action were pursued to the full extent provided for in the governing collective bargaining agreement, and the union even exercised its discretion in arbitrating the overtime grievance in the belief that a favorable ruling on this matter would result in the plaintiff's becoming eligible for "accident" benefits and being reinstated to some employment with Bell. The plaintiff has not shown, nor alleged, that the union had the power to assign him to some less strenuous assignments that would accommodate his injuries, or that such assignments were even available.

Whether a particular document is offered into evidence or a particular line of questioning of a witness is pursued does not support a finding of breach of the duty of fair representation because, as the plaintiff admits, lack of diligence or even the commission of negligence will not support a finding of arbitrary, capricious conduct. The union has not acted arbitrarily, has use of all procedures as provided for in the collective bargaining agreement in effect at the time, and the final resolution of the plaintiff's grievances, at the third level of the grievance procedure for the complaint about the classification of the plaintiff's injury and at arbitration for the complaint about eligibility for overtime, are binding on the plaintiff according to public policy and the collective bargaining agreement. The plaintiff has no claim against the defendant Communications Workers of America, Local 5703 for breach of its duty to fairly represent him.

Even if the plaintiff made sufficient allegations to support a claim against CWA for breach of the duty to fairly represent, the plaintiff's claims would be barred by the applicable statute of limitations, I.C. 34-4-2-13. Since Congress did not enact a specific statute of limitations for Section 301 actions, the timeliness of such actions is a matter of federal law to be determined by reference to the proper state statute of limitations. When no statute directly applies, one must be applied by analogy. Faced with the need to make a choice between a statute of limitations governing actions to vacate arbitration awards and a statute of limitations governing contracts, as this Court is, both the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit have chosen the former in suits against employees under Setcion 301. *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 101 S. Ct. 1559 (1981); *Davidson* v. *Roadway Express, Inc.*, 650 F. 2d 902 (1981). The record in this action shows that the essence of

the arbitrator's decision was that the plaintiff was not, according to the collective bargaining agreement, working for Bell at the time of the unfortunate accident; the plaintiff was "off-duty." If he had been "on-duty" he would have been eligible for compensation for the hours that he allegedly worked the night of the accident. Because a finding by this Court that the plaintiff was "on-duty" when the accident occurred would necessarily require overruling the arbitration decision, the statute of limitations applicable to actions to vacate arbitration awards, I.C. 34-4-2-13, is applicable. The statute of limitations as provided by that statute is ninety (90) days, and it began to run on May 13, 1981. There is no evidence in the record to justify a finding that either CWA or Bell waived the statute of limitations or that they should be estopped from asserting it; neither is there any reason on the record to support a finding that the statute of limitations should be equitably tolled. As the complaint in this action was not filed until April 9, 1982, the statute of limitations provided by I.C. 34-4-2-13 bars the plaintiff from bringing an action under Section 301 of the Labor-Management Relations Act.

The plaintiff also alleges that his termination from employment with Bell violated 29 U.S.C. 793, Section 503 of the Rehabilitation Act of 1973. Section 503 does not expressly provide a private right of action. The United States Court of Appeals for the Seventh Circuit, in *Simpson* v. *Reynolds Metals Company, Inc.*, 629 F. 2d 1226 (1980), could "find no extrinsic evidence on congressional intent . . . to create a private remedy nor have we discovered any subsequent persuasive indication that it has ever been the intent of Congress to create a private judicial remedy. Neither do we believe that implication is essential to achieving the objectives of the statute." *Id.* at 1244. This Court is bound by the decisions of the United States Court of Appeals for the Seventh Circuit, and ac-

cordingly a finding that there is no private right of action under Section 503 is mandated. Therefore, the claim under that section must be and hereby is dismissed.

There are no genuine issues as to any material facts.

The law is with the defendants and against the plaintiff.

JUDGMENT

It is hereby ADJUDGED that the plaintiff take nothing by virtue of this action and that civil action number NA 82-82-C is DISMISSED WITH PREJUDICE.

It is further ADJUDGED THAT THE COSTS OF THIS ACTION BE ASSESSED AGAINST THE PLAINTIFF.

Dated this 29th day of December, 1982.

Cale J. Holder, Judge

(s) Cale J. Holder
United States District Court
Southern District of Indiana

EXHIBIT D

ERNST

C.W.A. GRIEVANCE REPORT

Step 2

UNION #3

Employee Cliff Ernst Local 5703 Job Classification Plant Installation-Repair Tech.

Location 506 Mt. Tabor, New Albany Presented to Jim Lane Date 8-22-79

Steward Gary Bridgewater

Statement of Grievance Indiana Bell violated the contract, Appendix P-3, Section 3 (Proper pay) the week of my accident. IBT management (Jack Mattix) receive a note from me, while still in my hospital room, that explained my evening' events up to the accident, and in that note I requested a check-out time of 12:30 AM, 4-21-79. I found out about two weeks ago that management checked out at 5:30 PM 4-20-79, which is 7 hours short. (I've not been allowed a c of the timesheet.) I've got 2 pay-stubs for overtime equal to a check-out of approximately 11:15 PM 4-20-79 (!?) I'd like my timesheet corrected, an another check for difference still owed me.

Signed Clifford B. Ernst, Jr.
(Employee)

DISPOSITION BY COMPANY'S REPRESENTATIVE

IF SATISFACTORILY SETTLED, UNION REPRESENTATIVE WILL SIGN HERE

Signed

Title

Date

EXHIBIT D

copy

C.W.A. GRIEVANCE REPORT

Step 2

Employee Cliff Ernst Local 5703 Job Classification Plant Installation Repair Technician

Location 506 Mt. Tabor, New Albany Presented to Jim Lane Date 8-22-79

Steward Gary Bridgewater

(Unfair Treatment)

Statement of Grievance Following my vehicle accident (4-20-79) in Indiana Bell Telephone Co. work van, (in which I received a broken right ankle) I was notified of IBT's decision to classify my accident as Off-the-job "sickness" disability. Dist. Mgr. J. L. Allender sent me a letter dated 7-26-79 (I received it 7-28-79) that explained the company's "reasoning" on their decision. I feel this is wrong, and means improper benefits for me, particularly if my disability goes over a year. IBT is also implying wrong-doing on my part (driving a company vehicle without "permission"). I'm requesting the accident be reclassified to "ON-the -job", with proper benefits, and clearance of any disciplinary actions related to the accident.

Signed Clifford B. Ernst, Jr.
(Employee)

DISPOSITION BY COMPANY'S REPRESENTATIVE

IF SATISFACTORILY SETTLED, UNION REPRESENTATIVE WILL SIGN HERE

Signed

Title

Date

Signed
Union

23

No. 83-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFFORD B. ERNST, JR.

Petitioner,

versus

INDIANA BELL TELEPHONE COMPANY, INCORPORATED and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, INDIANA BELL TELEPHONE COMPANY, INCORPORATED.

WILLIAM E. ROBERTS
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, INDIANA BELL TELEPHONE COMPANY, INCORPORATED.

Respondent, Indiana Bell Telephone Company, Incorporated, respectfully prays that this Court deny the Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on July 28, 1983.

SUMMARY OF ARGUMENTS

I.

The Writ should be denied because Petitioner has failed to present any argument within the parameters of United States Supreme Court Rule 17, Considerations Governing Review On Certiorari, but rather merely argues the merits of his position.

II.

The Writ should be denied on the issue of the retroactivity of *DelCostello v. International Brotherhood of Teamsters* because, in the final analysis, that question is of only hypothetical significance in the instance case. Prior to the *DelCostello* decision, an Indiana plaintiff's Section 301 claim against his employer was governed by Indiana's 90-day statute of limitations for vacating arbitration awards. Petitioner's Section 301 claim, therefore, is barred by that 90-day statute of limitations, if not by *DelCostello*'s six-month statute of limitations.

III.

The Writ should also be denied on the issue of the retroactivity of *DelCostello* because there is no conflict among federal courts of appeals on this point. Additionally, there is no important federal question to be decided because *DelCostello* did not represent a "clean break" with past law; therefore, it was not fundamentally unfair to apply the six month statute of limitatons retroactively.

IV.

The Writ should likewise be denied on the issue of whether there is a private cause of action under 29 U.S.C. § 793(a) since every circuit court which has been presented with the opportunity of applying the *Cort v. Ash*, 442 U.S. 66 (1975), criteria to the language of that statute has found it inappropriate to imply a private remedy. Four of those decisions have been denied certiorari by this Court. Furthermore, there is no important federal question to be resolved.

V.

The issue of whether there was a genuine issue of material fact presented by Petitioner so as to preclude summary judgment is one which does not rise to the level of a question worthy of granting a Writ of Certiorari.

ARGUMENT

I.

The Writ Should be Denied Because Petitioner Only Argues The Merits Of The Issues He Raises And Does Not Set Forth What Considerations Warrant Granting His Petition.

Review on Writ of Certiorari is a matter of judicial discretion and is granted only when there are special and important reasons for so doing. United States Supreme Court Rule 17 references the types of reasons to be considered in granting review. Nowhere in his Petition does Petitioner address those reasons that make review appropriate; rather, he merely argues the merits of his position on the issues he raises.

II.

The Writ Should Be Denied On The Issue Of The Retroactivity of *DelCostello v. International Brotherhood Of Teamsters* Because It Is Academic In The Instance Case. Even If *DelCostello* Had Not Been Applied, Petitioner's Section 301 Claim Would Have Been Barred By The Much Shorter Limitations Period Found In Indiana Code § 34-4-2-13.

Petitioner contends that retroactive application of the six months' statute of limitations prescribed by this Court in *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (1983), would "work a severe hardship . . . and cause a substantial injustice upon" him. [Petition at 9] In support of this allegation, he claims that the controlling decision prior to *DelCostello* was *Auto Workers v. Hoosier*

Cardinal Corp., 383 U.S. 696 (1966), and that *Hoosier Cardinal* provided for a six year statute of limitations in suits brought by an employee against his employer and union pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) (1947), for breach of contract and breach of the duty of fair representation. This is inaccurate.

Contrary to Petitioner's claim, the controlling authority regarding the statute of limitations for hybrid Section 301/fair representation claims prior to *DelCostello* was this Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, this Court addressed the issue of which of two state statutes of limitation was properly borrowed and applied to an employee's action against his employer under Section 301. Analogizing such a claim to an action to vacate an arbitration award, this Court held that the proper statute of limitations was the New York 90-day state statute for vacating an arbitration award. Any other characterization of the action, this Court commented, overlooked the fact that "an arbitration award stands between the employee and any relief which may be awarded against the company." *Id.* at 63 n.4.

Indeed, in his concurring opinion Justice Stewart distinguished the Court's earlier decision in *Hoosier Cardinal* as one which involved a garden variety breach of contract damage suit brought by the union against an employer under Section 301. As such, the suit in *Hoosier Cardinal* had not implicated "'those consensual processes that federal labor law is chiefly designed to promote—*the formation of the agreement and the private settlement of disputes under it.*'" *Id.* at 66, *quoting* 383 U.S. at 702 (Stewart, J., concurring) (emphasis by Justice Stewart). That situation, he concluded, was distinct from the one presented in *Mitchell* for two reasons. First, because *Mitchell* was a suit which sought to set aside a final and binding arbitration decision, it did not pose a direct challenge to "'the private settlement of disputes under [the collective bargaining agreement].'" 451 U.S. at 66. Moreover, because the plaintiff necessarily

had to prove that he was unfairly represented by the union before he could reach the merits of his Section 301 claim against the employer, the suit was best described as "an amalgam of Section 301, which has no limitations period, and the NLRA." *Id.* at 67.

After this Court's decision in *Mitchell*, therefore, it was beyond doubt that the controlling authority in hybrid Section 301/fair representation suits was *Mitchell*, not *Hoosier Cardinal*. Following *Mitchell*, the United States Court of Appeals for the Seventh Circuit held in *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), *cert. denied*, 455 U.S. 947 (1982), that an employee's Section 301 claim against his employer and union brought in Indiana was governed by Indiana's 90-day statute of limitations for vacating arbitration awards. Indiana Code § 34-4-2-13 (1969).*

In the final analysis, therefore, the question of whether *DelCostello* is entitled to retroactive application is of only hypothetical significance in the instant case, since Petitioner's Section 301/fair representation claim is barred under the previous statute of limitations. Faced with this identical circumstance, the district court in *Marston v. LaClede Cab Co.*, Slip Opinion No. 83-1098(C)(1) (October 6, 1983, E.D. Mo.), made the following comment:

> "[T]his Court declines to pass on plaintiff's contention that *DelCostello* should not be applied retroactively, because the issue, fascinating as it may be, is only of hypothetical importance in this case. It is true that *DelCostello* changed the prior law, which was *Mitchell*, but application of *Mitchell* to this case would result in borrowing the [state] statute of limitations for vacating arbitration awards. Under that statute, the period of limitations applicable to plaintiff's federal claims . . . is ninety (90) days."

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*The district court in this case granted Indiana Bell's Motion for Summary Judgment, in part, because of the Indiana 90-day statute of limitations. 30 FEP Cases 1248 (S.D. Ind. 1981).

Id. at 3-4. (See Appendix at 4a-5a). *Accord Perez v. Dana Corporation*, 98 L.C. ¶10,484, 19,399 (3rd Cir., September 28, 1983) ("[I]n [*Mitchell*], the applicable state statute of limitations was only ninety days. [Plaintiff] obviously could not have relied on those cases in waiting twenty-three months to file this suit. Even if *DelCostello* constituted a clean break from the positions taken in [past] cases . . . it did not overrule past precedent on which [plaintiff] may have relied"); *James v. Communication Workers Local 3204*, 113 LRRM 3386 (N.D. Ga. 1983).

III.

The Writ Should Also Be Denied On The Issue Of The Retroactivity Of *DelCostello* Because There Is No Conflict Among Federal Courts Of Appeals Nor Is It Such An Important Question Of Federal Law As To Warrant A Decision By This Court.

Even if the issue of retroactivity is not considered to be academic in this case, the bases traditionally considered by this Court in granting review of a writ of certiorari are not present.

First, there is no conflict among federal courts of appeals as to whether *DelCostello* should be applied retroactively. Those appellate courts that have been confronted with Section 301 claims since *DelCostello* have applied it retroactively. The United States Court of Appeals for the Seventh Circuit did so in this case and subsequently in two others. *See Metz v. Tootsie Roll, Inc.*, 715 F.2d 299 (7th Cir. 1983); *Storck v. International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). The only other federal circuit courts of appeals discussing *DelCostello*, the Third and Sixth Circuits, have applied it retroactively. *See Perez v. Dana Corp.*, 98 L.C. ¶10,484 (3rd Cir., September 28, 1983); *Curtis v. Teamsters Local 299*, 716 F.2d 360 (6th Cir. 1983). In *Perez*, the Third Circuit applied the test set forth by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether retroactive application was proper,

and expressly held that *DelCostello*, even though "decided subsequent to *Mitchell* and during the pendency of this appeal, applie[d] retroactively." 98 L.C. at 19,397. The Sixth Circuit, while dismissing the complaint because of a procedural error, did "note that the disposition in this case would have been consistent with the recent Supreme Court opinion in *DelCostello*. . . ." 716 F.2d at 361.

Furthermore, the issue of retroactivity is not such an important question of federal law as to require this Court's review. The standard for determining whether a judicial decision is entitled to retroactive application was codified by this Court in *Chevron Oil*, which established the following three-part test:

> "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted] Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce a substantial inequitable result if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity.'" [citation omitted].

Id. at 106-107. As noted earlier in Section II, prior to *DelCostello* this Court's decision in *Mitchell* was the controlling authority with respect to the statute of limitations applied in employee suits brought under Section 301. Even after *Mitchell*, however, the issue of the statute of limitations to apply was not finally resolved, since this Court did not consider whether the six month federal statute of limita-

tions found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1947), might apply to such hybrid actions. *See Perez v. Dana Corp., supra*, 98 L.C. at 19,401 n. 7 ("The circuits could not agree on whether the same statute of limitations governed both the action against the employer and the action against the union").

In light of the above, it can hardly be argued that this Court's decision in *DelCostello* represented a "clean break" with the past, or that it would be fundamentally unfair to apply the standard established in *DelCostello*. Indeed, *Mitchell* actually represented a more severe departure from previous Section 301 analysis, and yet *Mitchell* was given retroactive application by courts confronted with the issue of retroactivity. In *Lawson v. Local Union 100*, 698 F.2d 250 (6th Cir. 1983), for example, the Sixth Circuit rejected the claim that *Mitchell* should not be applied retroactively. The Sixth Circuit stated that:

> "As *Mitchell* makes clear, the law on the limitations question in Section 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This Circuit and other circuits, prior to *Mitchell*, had adopted various state statutes of limitations, depending on the peculiarities of the limitations law of the state in question and the arguments of counsel in the particular case . . . [W]e do not believe that *Mitchell* represents the kind of 'clean break' with past precedent contemplated in *Chevron* and [*United States v. Johnson*, ____ U.S. ____ (1982)]. *Mitchell* was simply a 'clarification,' an attempt to impose a single policy and a single rule in a legally chaotic situation . . . We do not think that a 'clean break' occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases. We note also that both this Circuit and

> others have assumed that the *Mitchell* rule applies retroactively [citations omitted]."

Id. at 254. In fact, in her dissenting opinion in *DelCostello*, Justice O'Connor commented that, "It is quite appropriate to apply *Mitchell* retroactively. *Mitchell* did not represent a 'clear break' with past law. . . ." 51 U.S.L.W. at 4700 n. 2 (O'Connor, J., dissenting).

The guidelines for retroactivity, therefore, have already been established and that issue does not rise to the level of importance requiring this Court to address it.

IV.

The Writ Should Likewise Be Denied On The Issue Of Whether There Is A Private Cause of Action Under 29 U.S.C. § 793(a) Since There Is No Conflict Among Federal Courts of Appeals Nor Is That Issue Such An Important Question Of Federal Law Requiring This Court's Attention.

Whether it is appropriate to imply a private cause of action where none is expressly granted is a question controlled by the analysis set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. *See Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Cannon v. University of Chicago*, 441 U.S. 675 (1979).

Each of the six circuit courts which have been presented with the opportunity of applying the *Cort* criteria to the language of Section 503 have found it inappropriate to imply a private remedy, and four of those decisions were denied certiorari by this Court.* *See Beam v. Sun Ship Building & Dry Dock Co.*, 679 F.2d 1077 (3rd Cir. 1982); *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct.

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*This point, more than any other, also speaks to the fact that this issue is not of the significance or magnitude to require review by this Court.

178 (1982); *Davis v. United Airlines*, 662 F.2d 120 (2nd Cir. 1981), *cert. denied*, 102 S.Ct. 2045 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979). No conflict exists among the circuits.

Furthermore, the issue of whether an implied private cause of action is appropriate under Section 503 is not such an important question of federal law that this Court need address it. The criteria for determining if an implied private cause of action exists are well settled.

In *Cort*, the following principles were established for determining whether it was proper to imply a private remedy where the statute itself provides no guidance:

> "First is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' [citation omitted]—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? [citation omitted] Third, is it consistent with underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [citations omitted] And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to confer a cause of action based solely on federal law? [citations omitted]."

422 U.S. at 78.

As this Court further explained in *Cannon v. University of Chicago, supra*:

> "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a

> court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent."

441 U.S. at 688. Cases decided by this Court subsequent to *Cort* and *Cannon* have emphasized that the "ultimate issue is whether Congress intended to create a private right of action [citations omitted]; but the four factors specified in *Cort* remain the 'criteria through which this intent [can] be discerned.'" *California v. Sierra Club*, *supra*, at 287, *citing Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 771-772 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, *supra*, at 23-24; *Touche Ross & Co. v. Redington*, *supra*, at 575-576; *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The Seventh Circuit's opinion in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980), is a thorough analysis of the wording of Section 503 and its legislative history. In concluding that a private cause of action was inappropriate, the Seventh Circuit carefully evaluated each of the *Cort* criteria. It observed that Section 503 did not make discrimination against handicapped persons illegal, but only imposed an obligation on federal agencies administering federal contracts to incorporate an affirmative action clause. The Seventh Circuit went on to state that the language found in Section 503 fell squarely within this Court's observation in *Cannon* that:

> "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices."

Id. at 1240, *quoting* 441 U.S. at 690-693. The Seventh Circuit thus concluded that while Section 503 did identify "a particular class to be benefited . . . the lack of [any] duty-creating language in Section 503 makes implication of a private judicial remedy difficult." 629 F.2d at 1240. *See Can-*

non, supra, at 690 n. 13 ("Not surprisingly, the right or duty creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

The Seventh Circuit next examined the legislative history surrounding Section 503. Respondent will not recite that lengthy discussion. It speaks for itself and has been carefully exhumed for review by other circuit courts as well. *See Fisher v. City of Tucson, supra; Davis v. United Airlines, supra; Rogers v. Frito Lay, Inc., supra.* Suffice it to say that the Seventh Circuit concluded that:

> "With the exception of the language from [one] Senate Report, we find all these excerpts from the legislative history ambiguous in their reference to Section 503.
>
> * * *
>
> "We are left without any indication that, contemporaneous with its adoption of Section 503, Congress intended to extend a private remedy to handicapped individuals allegedly harmed by their employer's failure to comply with his affirmative action obligation as a federal contractor. At most, we are faced with an assumption on the part of a legislative committee in 1978 that five years earlier Congress had created a private right of action to enforce Section 503. Such an assumption cannot be relied upon as a faithful indicator of prior Congressional intent."

629 F.2d at 1242-1243.

Finally, the Seventh Circuit determined that implying a cause of action would not meaningfully advance the purposes of the legislation. It stated that:

> "Section 503(b) provides an express administrative remedy for a handicapped individual who believes he has been injured by a contractor's failure to comply with Section 503(a) and the regulations implementing that Section. This fact insofar as it discloses the underlying purposes of the legislative scheme suggests that the implication of a private right in favor of [the plain-

tiff], would be inconsistent with the scheme."

629 F.2d at 1243.

The fact that every circuit court which has decided the issue, both before and after the Seventh Circuit's *Simpson* decision, has reached the identical result demonstrates that the decision is grounded on sound policy and analysis.

Petitioner's citation of the Seventh Circuit's decision in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), is not to the contrary. [Petition at 12] *Lloyd* made reference to 29 U.S.C. § 794 [Section 504], not Section 503, and is taken entirely out of context. In *Lloyd*, the Seventh Circuit found that a private cause of action was properly implied into Section 504 because its language closely tracked that of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which this Court has held provides a private cause of action. *See Lau v. Nichols*, 414 U.S. 563 (1974). In addition, the Seventh Circuit noted that as of the time the suit was commenced no administrative remedy was available to the plaintiffs under Section 504. The court stated that "[w]ithout the benefit of any regulations, it is difficult to perceive what relief could have been afforded at [the administrative] stage." 548 F.2d at 1287.

Lloyd, then, is entirely distinguishable from the *Simpson* holding. Not only is the language of Section 504 different from Section 503, but extensive regulations have been promulgated to give full effect to the prohibitions of Section 503. *See* 41 CFR § 60-741 *et seq.*

Accordingly, since the Seventh Circuit's opinion in *Simpson* properly applies well established criteria, and since there is not one circuit court decision in disagreement with *Simpson*, Petitioner's request for certiorari on this issue should be denied.

V.

Whether There Were Genuine Issues of Material Fact Presented By Petitioner So As To Preclude Summary Judgment Is Not An Issue That Properly Warrants Consideration By This Court.

The last issue Petitioner raises is whether the district court's grant of summary judgment against him was appropriate. Such a routine and common question does not rise to the level of the character of reasons for which this Court grants a writ of certiorari. Additionally, for the reasons set forth in Section II above, this issue is academic and need not be addressed.

CONCLUSION

Petitioner has failed to articulate any reasons or considerations of the character specified in Supreme Court Rule 17 that would suggest the Court should exercise its judicial discretion and grant review. Furthermore, when one scrutinizes the appropriate considerations it is abundantly clear that the Writ for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1098C(1)

DONALD MARSTON,

Plaintiff,

vs.

LACLEDE CAB COMPANY and
TEAMSTERS LOCAL UNION NO. 688,

Defendants.

ORDER

IT IS HEREBY ORDERED that defendants' motions for summary judgment on Court I of plaintiff's complaint, based upon the bar of the statute of limitations, be and are granted.

IT IS FURTHER ORDERED that Count I of plaintiff's complaint be and is dismissed with prejudice.

IT IS FURTHER ORDERED that Count II of plaintiff's complaint be and is remanded to the Circuit Court of the City of St. Louis, State of Missouri.

IT IS FURTHER ORDERED that defendant Laclede Cab's motion to strike be and is denied as moot.

/s/ John F. Nagle
UNITED STATES DISTRICT JUDGE

Dated: October 6, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1098C(1)

DONALD MARSTON,

Plaintiff

vs.

LACLEDE CAB COMPANY and
TEAMSTERS LOCAL UNION NO. 688,

Defendants.

MEMORANDUM

This case is now before this Court on the motions of defendants for judgment on the pleadings or, in the alternative, for summary judgment, with respect to Count I of plaintiff's complaint. Defendants argue that Count I is barred by the statute of limitations.

Plaintiff's cause of action arises out of his discharge from employment by defendant Laclede Cab Company (Laclede). The factual allegations are as follows. Plaintiff, who worked as a dispatcher for Laclede, was discharged on February 12, 1982. The alleged reasons for plaintiff's discharge were 1) plaintiff's "dishonesty", on February 10, 1982, in telling a Laclede Cab driver that plaintiff did not know the telephone number of the fire department when the driver requested it; and 2) plaintiff's lack of compassion in refusing to give the telephone number when a cab (belonging to a competitor of Laclede) was on fire. Plaintiff grieved his discharge and requested a service letter. The grievance was carried through step four (4) of the grievance procedure provided by the collective bargaining contract between defendants and covering plaintiff. Step four (4) is a two (2) man Adjustment Board consisting of one union and one company representative. On February 21, 1982, plaintiff was informed by his Shop Steward, a member of defendant

Teamsters Local Union No. 688 (Teamsters), that the Adjustment Board found in favor of Laclede. Sometime around the end of March, 1982,[1] plaintiff was informed by the Business Agent for Teamsters that plaintiff's grievance would not be taken to arbitration. Around the same time Laclede responded to plaintiff's request for a Service Letter with the statement that plaintiff was discharged on account of dishonesty in connection with the February 10, 1982, telephone number incident. Thereafter, on April 5, 1982, plaintiff requested a meeting of Teamsters' Executive Board to discuss his grievance and on May 27, 1982, the Executive Board denied his request.

On April 14, 1983, plaintiff filed the complaint in the Circuit Court for the City of St. Louis, State of Missouri. In Count I plaintiff alleges that Laclede's discharge of plaintiff was based on arbitrary and capricious grounds in violation of the collective bargaining agreement and that Teamsters violated its duty of fair representation of plaintiff in refusing to take his grievance to arbitration. In addition, Count I alleges a conspiracy between Laclede and Teamsters to discharge plaintiff on arbitrary grounds. All the acts in Count I are alleged to be violations of the Labor Management Relations Act of 1947 (LMRA). 29 U.S.C. §§ 141 *et seq.* Count II is based upon Missouri's Service Letter statute, R.S.Mo. § 290.140 (1982), and alleges that the reasons given by Laclede for plaintiff's discharge were false.

Defendants removed the case to this Court, under 28 U.S.C. § 1441, on the ground that this Court has original jurisdiction under section 301 of the LMRA, 29 U.S.C. § 185, over Count I of plaintiff's complaint and pendent jurisdiction over Count II. Defendants then moved for summary judgment in their favor on Count I on the ground that it is barred by the applicable statute of limitations.

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[1]In paragraph 9 of plaintiff's complaint the date is described as a few days after "March 25, *1983*." However, it is clear from other allegations in the complaint and the memoranda of the parties that March 25, *1982*, is what was intended.

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed.R.Civ.P.* 56(e). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In passing upon a Rule 56 motion for summary judgment, a court is required "to view the facts in the light most favorable to the party opposing the motion." *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980).

In *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (June 8, 1983), the Supreme Court considered the question of what period of limitations should govern in an employee's hybrid section 301/fair representation suit against an employer and a union. Earlier, in *United Parcel Service, Inc., v. Mitchell*, 451 U.S. 56 (1981), the Court held that a state statute of limitation for vacation of an arbitration award, rather than a state statute for an action on a contract, should govern in a section 301 suit against an employer. However, in *DelCostello* the Court effectively overruled *Mitchell* and held that the six (6)-month period of limitations provided in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should govern in hybrid section 301/fair representation suits both as to the claim against the employer and the claim against the union.

Defendants rely on *DelCostello* to support their contention that Count I of plaintiff's complaint is time-barred. It is the opinion of this Court that no genuine issue of material fact exists with respect to the statute of limitation question and, therefore, summary judgment is appropriate. The legal issues raised by defendants' motions and plaintiff's reply are as follows: 1) whether *DelCostello* should apply retroactively; and 2) when did plaintiff's causes of action under Count I accrue.

Plaintiff raises the retroactivity question because *DelCostello* was decided nearly two (2) months after plaintiff filed his complaint in state court. However, this Court

declines to pass on plaintiff's contention that *DelCostello* should not be applied retroactively, because the issue, fascinating as it may be, is only of hypothetical importance in this case. *cf. Storck v. Int'l. Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). It is true that *DelCostello* changed prior law, which was *Mitchell*, but application of *Mitchell* to this case would result in borrowing the Missouri statute of limitations for vacating arbitration awards. Under that statute, R.S.Mo. § 435.405.2, the period of limitations applicable to plaintiff's federal claims in Count I is ninety (90) days.[2]

Plaintiff contends, relying on *Butler v. Local Union 823, Int'l. Brotherhood of Teamsters*, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975), that prior to *DelCostello* the Missouri five (5)-year statute of limitations for breach of contract actions would have applied to plaintiff's claims. This Court rejects plaintiff's argument because *Mitchell* in effect overruled *Butler's* choice of a state statute of limitations and borrowed a statute which typically provided a much shorter period. Arguably after *Mitchell* it was not clear which limitations period applied to a fair representation claim against a union. *See DelCostello*, 51 U.S.L.W. at 4694 n.1. However, *Butler* held that the period applicable to a section 301 claim also applies to a fair representation claim, 514 F.2d at 448, and *Mitchell* did not affect that portion of the Eighth Circuit's holding. Accordingly, in this circuit at least, after *Mitchell* and prior to *DelCostello* the period applicable to a hybrid section 301/unfair representation claim was the ninety (90)-day period in R.S.Mo. §

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[2]Prior to *DelCostello*, the period of limitations for vacating arbitration awards would have applied from the time plaintiff's claims accrued under federal law, even though plaintiff's grievance was never in fact taken to arbitration. *Hunt v. Missouri Pacific R.R.*, 561 F. Supp. 310, 314 (E.D. Ark. 1983); *Stahlman v. Kroger Co.*, 542 F. Supp. 1118, 1120 (E.D. Mo. 1982).

R.S.Mo. § 435.405.2 applies to all contracts entered into after August 13, 1980. *Stahlman*, 542 F. Supp. at 1120 n.1. The contract in this case was entered into on December 1, 1980.

435.405.2. Under *DelCostello* the period is six (6)-months or double that which plaintiff was entitled to prior to *DelCostello*. In light of this conclusion, it is unlikely that plaintiff wishes to contend that *DelCostello* should not be applied retroactively, and this Court does not reach that issue.

With respect to the issue of accrual, it is settled that a hybrid section 301/fair representation claim against both an employer and a union accrues on the date the employee's grievance is finally rejected and his opportunity to gain reinstatement through the contractual grievance procedure is aborted. *Butler*, 514 F.2d at 449; *Collins v. American Freight System, Inc.*, 559 F. Supp. 1032, 1036 (W.D. Mo. 1983); *Wilcoxen v. Kroger Food Stores*, 545 F. Supp. 1019, 1021 (E.D. Mo. 1982); *Stahlman v. Kroger Co.*, 542 F. Supp. 1118, 1120 (E.D. Mo. 1982); *Lincoln v. District 9 of the International Association of Machinists and Aerospace Workers*, 539 F. Supp. 1346, 1348 (E.D. Mo. 1982); *Fields v. Babcock & Wilcox*, 108 LRRM 3150, 3151 (W.D. Pa. 1981). The validity of this accrual rule was not affected by the Supreme Court's decisions in either *Mitchell* or *DelCostello*. In the case at bar, plaintiff's grievance was finally rejected around the end of March, 1982, when plaintiff was informed that his grievance would not be taken to arbitration. Plaintiff cites *Smith v. International Ladies Garment Workers Union*, 537 F. Supp. 347, 349 (M.D.Al. 1981), for the proposition that his claim did not accrue until defendants' last contact with the grievance filed by plaintiff, and argues that under this theory his claim did not accrue until May 27, 1982. Plaintiff concedes, however, that under either date his claim was not filed within six months thereafter and is thus time-barred if his claim accrued on either date.

As a last resort, plaintiff asserts that his claim should not be deemed to have accrued:

> until he had exhausted all of his administrative remedies as set forth in Section 10(B) (sic) . . . , or until the grievance was arbitrated or Plaintiff was given an explanation as to why the grievance would not be arbitrated.

"*Plaintiff's Trial Brief*" at 3-4. This Court rejects the latter two alternatives as illogical, frivolous and without merit. No arbitration has ever occurred and plaintiff has never been given an explanation as to why his grievance was not taken to arbitration. Plaintiff's argument is self-defeating in that it would logically lead to the conclusion that his claim has not accrued to this date. *See also, supra*, note 2. With respect to plaintiff's first alternative, plaintiff impliedly argues that in adopting the six (6)-month period of limitation in section 10(b) for hybrid section 301/fair representation claims, the Supreme Court in *DelCostello* also adopted the full panoply of section 10(b) N.L.R.B. procedures as conditions precedent to such suits. This Court cannot find support for plaintiff's argument in either the language or rationale of the Supreme Court's opinion in *DelCostello*.

Accordingly, this Court finds that plaintiff's claims in Count I accrued, at the latest, on or about May 27, 1982, and that such claims are barred by the applicable six (6)-month period of limitations. Defendants' motions for summary judgment be and are granted.

Plaintiff's remaining Count II is a state law claim over which this Court lacks original jurisdiction. Under 28 U.S.C. § 141(c) this Court has discretion to "remand all matters not otherwise within its original jurisdiction." Therefore, plaintiff's only remaining count, Count II, be and is remanded to the Circuit Court of the City of St. Louis, State of Missouri.

/s/ John F. Nagle
UNITED STATES DISTRICT JUDGE

Dated: October 6, 1983

No. 83-687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CLIFFORD B. ERNST, JR.,
Petitioner,

v.

INDIANA BELL TELEPHONE CO., INC. and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703,
Respondents.

BRIEF OF COMMUNICATIONS WORKERS OF AMERICA LOCAL 5703 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUES PRESENTED

(1) Should this Court review the issue of whether its decision in *Del Costello v. Teamsters*, —— U.S. ——, 103 S.Ct. 228 (1982) should be applied retroactively in light of the facts that even without retroactive application the decision dismissing the Petitioner's claim against the Union would not be reversed since the Court of Appeals affirmed the District Court's dismissal on the merits and the Petitioner did not raise the issue of retroactivity in the court of appeals?

(2) If the Petitioner is attempting to review the issue of whether Section 503 of the Rehabilitation Act provides a private right of action against a labor union, should this Court review that issue in light of the facts that no such claim was pleaded in the original complaint and there is no conflict between the Court of Appeal's decision on that issue and any decision of this court or any other Court of Appeal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-687

CLIFFORD B. ERNST, JR.,
Petitioner,

v.

INDIANA BELL TELEPHONE CO., INC. and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703,
Respondents.

BRIEF OF COMMUNICATIONS WORKERS OF AMERICA LOCAL 5703 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Communications Workers of America, Local 5703 (hereafter "Union" or "Local 5703") opposes the Petition for Writ of Certiorari filed by Petitioner, Clifford B. Ernst, Jr., and for the reasons set forth herein, respectfully prays that the Petition be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Reasons Why The Writ Should Be Denied With Respect To Petitioner's Claim That This Court's Decision In *Del Costello v. Teamsters* Should Not Be Applied Retroactively.

On June 8, 1983, this Court announced its decision in the case of *Del Costello v. Teamsters*, —— U.S. ——, 103 S.Ct. 228 (1983). In that case the Court held that the

six-month statute of limitation contained in Section 10 (b) of the National Labor Relations Act should be applied to an action against a labor union for breach of the duty of fair representation.

To the knowledge of counsel for the Respondent Union, three Circuit Courts of Appeals have addressed the issue of retroactive application of this Court's decision in *Del Costello*. The Courts of Appeals for the Third and Eleventh Circuits after careful consideration held that *Del Costello* should be applied retroactively. *Perez v. Dana Corp.*, —— F.2d ——, 114 LRRM 2814 (3d Cir. 1983); *Rogers v. Lockheed-Georgia Co.*, —— F.2d ——, No. 81-7810 (11th Cir. Dec. 5, 1983). The Ninth Circuit in *Edwards v. Teamsters Local 36*, —— F.2d ——, 114 LRRM 3227 (9th Cir. 1983), ruled that *Del Costello* should not be applied retroactively. Thus, there admittedly exists a split among the Courts of Appeals with respect to the issue being presented by the Petitioner in the case *sub judice*. We urge, however, that for the reasons set forth below, the present case is clearly an inappropriate case for resolving that conflict.

1. ***Even if the Court Should Rule That the Petitioner's Breach of Duty of Fair Representation Claim Was Not Time-Barred, That Would Not Alter the Final Result Since the Court of Appeals Affirmed Dismissal of That Claim on the Merits.***

As the Petition clearly shows, the Petitioner is, in essence, seeking to have this Court review the manner in which a union attorney exercised her discretion in presenting his grievance to an arbitrator. This is clearly no basis for the granting of a writ of *certiorari*. The District Court found and the Court of Appeals affirmed that, as a matter of law, based upon the undisputed facts, the Union did not breach its duty of fair representation. Thus, even if this Court should rule that that claim was not time-barred, the result would nevertheless

be the same; the breach of duty of fair representation claim would stand dismissed.

2. *The Petitioner May Not Raise the Issue of Retroactivity in a Petition for Writ of* Certiorari *for the Reason that that Issue Was Not Raised in the Court of Appeals.*

The general rule in this Court is that a party may not obtain review of an issue which was not raised in the lower courts. *See, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346 (1981); *Neely v. Martin K. Eby Construction Co.,* 366 U.S. 317 (1967).

The appeal in this case was argued in the Court of Appeals on June 9, 1983. At that time the panel as well as counsel for the Petitioner were apprised of the previous day's decision in *Del Costello v. Teamsters,* and served with copies of that decision. No objection to retroactive application of that decision was made during oral argument. Under the Local Rules of the Seventh Circuit the issue of retroactive application of *Del Costello* could have been raised subsequent to oral argument in two ways. Circuit Rule 11 provides that a party may provide the Court with additional authority after oral argument and Circuit Rule 16 provides for petitions for rehearing. The Petitioner in this case could have raised the issue of retroactive application of *Del Costello* under either of these rules but did not. For this reason alone *certiorari* should be denied.

B. Reasons Why The Writ Should Be Denied With Respect To Petitioner's Second Claim That He Has An Implied Right To Bring A Private Action Pursuant To Section 503(a) Of The Rehabilitation Act Of 1973 As Amended.

In his original Complaint the Petitioner did not allege any facts which even arguably relate to an allegation of discrimination on the basis of handicap as against the

Union. Moreover in his Petition for Writ of Certiorari it does not appear that he is seeking review of the question of whether a private right of action exists as against a labor union under Section 503(a) of the Rehabilitation Act of 1973 as Amended, 29 U.S.C. § 793(a).[1]

In any event, to the knowledge of counsel for the Respondent, it has been the unanimous holding of all Courts of Appeal which have addressed the issue that Section 503(a) does not provide a private right of action. *See, e.g., Beam v. Sun Ship Building & Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 178 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980); *Hoopes v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979); *see also, Prewitt v. United States Postal Service*, 662 F.2d 292, 302 (5th Cir. 1981) which holds that a private right of action does exist under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Thus, if Petitioner is seeking review of whether he possesses a private right of action under Section 503 as against a labor union, *certiorari* should be denied.

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[1] Section 503 of the Vocational Rehabilitation Act of 1973 as Amended, provides that contracts in excess of $2,500 entered into by any Federal departments or agencies for the procurement of personal property and non-personal services must contain a provision requiring that the contracting party take affirmative action to employ qualified handicapped individuals. 29 U.S.C. § 793(a). This obviously has no relevance to Petitioner's claims against the Union.

C. There Is No Basis For Granting *Certiorari* With Respect To The Issue Of Whether The District Court Ignored Genuine Issues Of Material Fact In Granting Summary Judgment.

There is absolutely no basis for granting *certiorari* in order to determine if the District Court erred in granting summary judgment due to the existence of genuine issues of material facts. As a threshold consideration, this issue simply lacks the degree of general public importance to warrant exercise of this Court's jurisdiction. *Certiorari* should be denied for that reason. *See, e.g., Gordon v. New York Stock Exchange*, 422 U.S. 659, 663 (1975); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Moreover, review of that issue would contravene this Court's well-founded policy of avoiding review of "evidence and discuss[ion] of specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1924). It is well-established that this Court will ordinarily refuse to grant *certiorari* in order to review a lower court's finding or consideration of factual issues. *Berenyi v. Director, Immigration and Naturalization Services*, 385 U.S. 630, 635 (1966).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied as to all issues.

Respectfully submitted,

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